Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

RANDALL C. SCARBOROUGH,

Petitioner,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 7, 2003

QUESTION PRESENTED

In December 2001, in an earlier appeal in this case, the United States Court of Appeals for the Federal Circuit held that an attorney's fee application under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), is jurisdictionally barred if the fee applicant does not allege, within the statute's 30-day limitations period, that the position of the United States lacked substantial justification, even when the application itself is timely filed and the applicant promptly amends the application to supply the allegation. The Federal Circuit acknowledged that its holding directly conflicted with decisions of other circuits. On June 17, 2002, this Court granted a petition for a writ of certiorari, vacated the Federal Circuit's decision, and remanded in light of *Edelman v. Lynchburg College*, 122 S. Ct. 1145 (2002). In a nearly verbatim reprise of its earlier ruling, the Federal Circuit again held the fee application jurisdictionally barred. That court again acknowledged the circuit split and then found *Edelman* inapposite. The question presented is the same as that presented in the earlier petition to this Court:

> Whether, or in what circumstances, an applicant for attorney's fees under the Equal Access to Justice Act is barred from obtaining a fee award by the Act's 30-day statute of limitations solely because the applicant's timely-filed fee application did not initially allege that the position of the government in the underlying litigation lacked substantial justification.

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Petitioner Randall C. Scarborough respectfully petitions this Court for a writ of certiorari to review the decision below of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit affirming the dismissal of petitioner's application for attorney's fees, on remand from this Court, is reported at 319 F.3d 1346 (Fed. Cir. 2003), and is reproduced in the appendix at 1a. The opinion of the United States Court of Appeals for Veterans Claims dismissing petitioner's fee application is reported at 13 Vet. App. 530 (Vet. App. 2000), and is reproduced at 22a. The original opinion of the United States Court of Appeals for the Federal Circuit affirming the dismissal of petitioner's application for attorney's fees is reported at 273 F.3d 1087 (Fed. Cir. 2001), and is reproduced at 26a. The decision of this Court granting petitioner's first petition for a writ of certiorari and vacating the original judgment of the Federal Circuit for reconsideration in light of *Edelman v. Lynchburg College*, 122 S. Ct. 1145 (2002), is reported at 536 U.S. 920 (2002), and is reproduced at 36a. The unreported post-remand decision of the United States Court of Appeals for the Federal Circuit denying panel rehearing and rehearing en banc is reproduced at 37a. The Federal Circuit's unreported decision denying rehearing and rehearing en banc after its original ruling is reproduced at 39a. The unreported decision of the United States Court of Appeals for Veterans Claims in favor of petitioner on the merits of his disability claim is reproduced at 41a.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit affirming the dismissal of petitioner's fee application was entered on February 13, 2003. Pet. App. 1a.

Petitioner filed a timely petition for rehearing en banc on February 24, 2003, which the Federal Circuit treated as a petition for panel rehearing and for rehearing en banc and denied on April 17, 2003. Pet. App. 37a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Equal Access to Justice Act, 28 U.S.C. § 2412(d), provides in relevant part:

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> (B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States

> was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

STATEMENT OF THE CASE

On two occasions — both before and after remand from this Court — and in direct conflict with decisions of the Third, Sixth, and Eleventh Circuits, the United States Court of Appeals for the Federal Circuit has held that an application for attorney's fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), is jurisdictionally barred if the application does not, within EAJA's 30-day statute of limitations, allege that the government's position on the merits in the underlying litigation lacked substantial justification. The Federal Circuit came to that conclusion despite this Court's holding in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), that statutes of limitations running in favor of the federal government presumptively are not jurisdictional, but rather are subject to equitable principles such as tolling, estoppel, waiver, and relation back. In addition, the ruling below is based on an interpretation of EAJA's text that cannot be squared with this Court's holding in *Edelman v. Lynchburg College*, 122 S. Ct. 1145 (2002), the decision that this Court directed the court of appeals to consider on remand.

A. The Underlying Litigation Giving Rise To Petitioner's Fee Claim

Petitioner Randall C. Scarborough served in the United

States Navy from 1972 to 1975, when he was discharged because of chronic renal failure. CAVC Record at 56. In 1993, petitioner applied for and was granted disability benefits from the Department of Veterans Affairs ("VA"). The VA agreed with petitioner that his renal failure was incurred during his military service and he was awarded a 100% disability rating. CAVC Record at 343. A dispute arose, however, concerning the effective date of petitioner's disability. Petitioner contended that his service-connected disability dated back to 1975, and challenged a March 1976 VA finding that his renal disease was not service-connected. The Secretary of Veterans Affairs, the respondent in this Court, disagreed, arguing that the VA's 1976 finding was not "clear and unmistakable error," the acknowledged standard for overturning that finding.

Petitioner pursued his case to the Board of Veterans' Appeals ("BVA"), which rejected petitioner's claim of clear and unmistakable error. Petitioner appealed the BVA's decision to the United States Court of Appeals for Veterans Claims ("CAVC"), which had jurisdiction over petitioner's appeal under 38 U.S.C. § 7252(a). The CAVC's July 9, 1999, decision began by noting that petitioner's case was appropriate for decision by a single judge because it was one "of relative simplicity and the outcome [was] not reasonably debatable." Pet. App. 41a (quoting *Frankel v. Derwinski*, 1 Vet. App. 23, 25-26 (Vet. App. 1990)). The CAVC then reversed the BVA's decision on the ground that the BVA had failed to consider the legal standards governing whether the 1976 finding was infected with clear and unmistakable error and remanded the case for further determinations regarding the validity of that finding. Pet. App. 42a-43a. On remand, petitioner was awarded retroactive benefits for the period 1975 to 1993.

B. Applicable EAJA Principles

To understand the dispute over petitioner's fee application, it is necessary briefly to review applicable EAJA principles. In general, EAJA provides that attorney's fees and expenses "shall" be awarded to eligible parties who have prevailed in litigation against the federal government, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). Individuals are eligible for fees if their net worth does not exceed $2 million. *Id.* § 2412(d)(2)(B). To meet the substantial justification standard, the government bears the burden of showing that its position had a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Hundreds of EAJA applications are considered each year by the CAVC. *See* CAVC Annual Reports (http://www.vetapp.uscourts.gov/About Court/AnnualReport.asp).[1]

Of particular relevance here, EAJA provides that a party seeking fees shall submit its fee application within 30 days of "final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). "Final judgment" is defined as "a judgment that is final and not appealable...." *Id.* § 2412(d)(2)(G). The first sentence of subsection (d)(1)(B) describes the information to be included in the fee application:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other

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[1]In 2000, the year in which the CAVC dismissed petitioner's fee application, 634 EAJA applications were granted, 32 were denied, and 110 were dismissed. *See id.*

> expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed.

Id. § 2412(d)(1)(B). It is undisputed that petitioner's fee application was submitted "within thirty days of final judgment" and contained all of the information called for by this sentence. *See* Fed. Cir. Jt. App. 13-19.

The next sentence of subsection (d)(1)(B) — not the sentence containing the 30-day filing period — states that "[t]he party shall also allege that the position of the United States was not substantially justified." 28 U.S.C. § 2412(d)(1)(B). Petitioner's initial fee application did not contain this allegation; however, as discussed further below, petitioner amended his application to add the allegation immediately after respondent moved to dismiss his application on the ground that it did not contain the allegation. Fed. Cir. Jt. App. 6.

C. Proceedings On Petitioner's Fee Application In The Court Of Appeals For Veterans Claims

On July 20, 1999, just 11 days after he prevailed on the merits in the CAVC, petitioner submitted an EAJA application seeking attorney's fees and expenses of $19,333.75 and served the application on counsel for respondent. Fed. Cir. Jt. App. 21-22. However, the Clerk of the CAVC did not file the application. Instead, under a notice dated July 23, 1999, the

Clerk returned the application to petitioner on the ground that his EAJA application was filed too soon because it may only be filed within 30 days "after the Court's judgment becomes final," and that finality does not occur until after the time for filing post-decision motions and appealing to the Federal Circuit has expired. Fed. Cir. Jt. App. 20.

On August 19, 1999, petitioner submitted a second EAJA application. At the same time petitioner submitted that fee application, he served it on counsel for respondent. Under then-applicable CAVC Rule 39(c), respondent was required to serve and file his response to the application within 30 days of service of the fee application upon him, but respondent failed to do so. Meanwhile, petitioner's fee application was not immediately filed by the CAVC Clerk. Rather, the Clerk once again deemed the application "premature" on the ground that the CAVC's mandate had not yet issued in the underlying litigation and therefore, according to the Clerk, there was still no "final judgment" in the action. Pet. App. 23a. On October 4, 1999, after issuance of the mandate, the CAVC Clerk filed petitioner's fee application. Fed. Cir. Jt. App. 12.[2]

After the application was filed, respondent obtained an extension of time to answer the fee application (to which petitioner had consented) to December 3, 1999. *See* Fed. Cir. Jt. App. 3. On that date, respondent moved to dismiss the fee application for lack of subject matter jurisdiction. Respondent

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[2]The CAVC apparently views EAJA's 30-day limitations period as fixing not only the *last day* on which a fee application *must* be filed but also the *first day* on which a fee application *may* be filed. *But see Shalala v. Schaefer*, 509 U.S. 292, 303 (1993) (holding EAJA fee application timely even where no final judgment was ever entered).

argued that, although the fee application was timely filed, petitioner had not made an allegation that respondent's position lacked substantial justification within the now-expired 30-day period. Respondent relied on the text of EAJA, which it claimed required the no-substantial-justification allegation to be made within the 30-day period, and on *Bazalo v. West*, 150 F.3d 1380, 1381, 1383 (Fed. Cir. 1998), which held that the 30-day period is "jurisdictional."

Immediately after receiving respondent's motion to dismiss, petitioner filed an amendment to his fee application alleging that "[t]he government's position that the Appellant had not shown clear and unmistakable error in the 1976 [VA] decision was not substantially justified." Fed. Cir. Jt. App. 6 (Dec. 9, 1999). At the same time, petitioner opposed the motion to dismiss, arguing that his earlier omission of the no-substantial-justification allegation was not a jurisdictional defect. Petitioner also relied on *Bazalo*, which, although stating that EAJA's limitations period is jurisdictional, held that a fee applicant's failure to make a net-worth eligibility allegation within the 30-day period was not a jurisdictional bar if the fee applicant had alleged that he was the prevailing party — which, the court held, "subsume[s]" the net worth issue — and the government is not prejudiced by the omission. *See Bazalo*, 150 F.3d at 1382, 1383-84. Petitioner also urged that the limitations period be tolled, and that the government be estopped from enforcing it, because the government itself had delayed the case by seeking an extension to file its response to the application (and obtaining petitioner's consent to that extension) and had never sought information from petitioner on the substantial justification question despite having been served with the application months earlier.

On June 14, 2000, the CAVC dismissed petitioner's fee

application on the grounds urged by respondent. Pet. App. 22a-25a.

D. Initial Proceedings And Decision In The Federal Circuit

Petitioner appealed to the Federal Circuit. He contended that EAJA requires only that the application itself, not the no-substantial-justification allegation, be made within the 30-day period. He also argued that the government was estopped from relying on that deadline because it had a lengthy opportunity to bring the alleged defect to petitioner's attention if it truly desired the missing information or wanted to avoid delay. In this regard, petitioner pointed to CAVC Rule 39(c), which required the government to respond to the fee application within 30 days of service of the application and which, if complied with, would have brought the omission to petitioner's attention well before the 30-day period expired.[3]

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[3]As petitioner put it below:

> Clearly government's counsel saw the defect in the application and knew that if the government responded within the 30 day requirement of Rule 39, the Veteran would have amended the application to comply with 28 U.S.C. §2412. Rather than show its cards to the Veteran, the government decided to wait until 30 days had passed the final judgment date when it would [in respondent's view] be too late for the Veteran to make a timely supplement to the application.

Brief for Appellant, at 10, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Sept. 29, 2000). The government did not deny that it knew

(continued...)

Petitioner also relied on this Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), which held that, absent statutory language to the contrary, limitations periods for claims against the federal government, like those involving private defendants, are not jurisdictional bars, but rather are subject to ordinary equitable principles, such as tolling and estoppel. Finally, petitioner argued that his amendment to the fee application should have been accepted because the burden of showing substantial justification is on the government. EAJA, petitioner noted, mandates an award of fees to a prevailing party "unless" the court finds that the government's position is substantially justified, 28 U.S.C. § 2412(d)(1)(A), and thus EAJA requires the government to carry the burden on the substantial justification issue whenever it wishes to avoid payment of fees to a prevailing party.

The Federal Circuit affirmed. The court first stated its understanding of 28 U.S.C. § 2412(d)(1)(B). That section, the court said, specifies that a fee applicant shall, within 30 days of final judgment, submit an application stating (1) that the applicant is a prevailing party, (2) that the applicant is eligible to receive fees (the net-worth allegation), (3) the amount sought, including an itemization, and (4) that the position of the United States was not substantially justified. Pet. App. 29a; *see also* Pet. 30a ("The same mandatory language ('shall') is used with respect to the thirty-day time limit as with the other four

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[3](...continued)
of the alleged defect and deliberately waited for the 30-day period to pass, but maintained that "the timing of the Government's filing does not relieve an applicant of the jurisdictional burden to submit a complete and timely EAJA application." Brief for Respondent-Appellee, at 7 n.4, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Jan. 9, 2001).

requirements..."). The court started from the premise that "the thirty-day time limit for submitting a fee application under the EAJA [is] jurisdictional in nature" (Pet. App. 30a), and then posed what it viewed as the question before it: "whether the other four requirements enumerated in the EAJA statute are likewise jurisdictional." *Id.* It answered that question "yes," holding that EAJA's "plain language" requires not only that an application be filed within 30 days of final judgment, but that the application contain averments about all four topics mentioned in section 2412(d)(1)(B), including a lack of substantial justification. Pet. App. 33a. The court acknowledged a direct conflict with decisions of the Third and Eleventh Circuits, which held that a timely-filed EAJA fee application may be supplemented to supply information on those four topics absent prejudice to the government. *See* Pet. App. 30a-32a.

Petitioner sought rehearing en banc, which was denied on February 25, 2002. Pet. App. 15a.

E. Initial Proceedings Before This Court And The Intervening Decision In *Edelman*

On March 13, 2002, petitioner filed a petition for a writ of certiorari. Petitioner urged review principally on the grounds that the Federal Circuit's decision had created a division among the circuit courts and could not be reconciled with the Court's decision in *Irwin*. *See* Petition for a Writ of Certiorari, *Scarborough v. Principi*, No. 01-1360 (filed Mar. 13, 2002).

Shortly after the petition was filed, this Court decided *Edelman v. Lynchburg College*, 122 S. Ct. 1145 (2002). In that case, plaintiff Edelman filed a letter with the EEOC claiming that Lynchburg College had discriminated against him in

violation of Title VII of the Civil Rights Act of 1964. 122 S. Ct. at 1149. Although the parties disagreed about whether the letter constituted a formal "charge" of discrimination, the Court assumed that it was a "charge" for the purposes of its decision. *See id.* at 1152. Edelman and the College agreed that the letter was filed within the relevant limitations period set forth in section 706(e)(1) of the Act, 42 U.S.C. § 2000e-5(e)(1), which requires that a charge be filed within 300 days of the alleged discrimination. Another provision of the same section of the Act, section 706(b), 42 U.S.C. § 2000e-5(b), requires that a charge be verified, *i.e.*, "be in writing under oath or affirmation...." Edelman met this requirement as well, but not until after the 300-day limitations period of section 706(e)(1) had expired. 122 S. Ct. at 1148.

Edelman relied on an EEOC regulation that provides that a charge is "sufficient" when the EEOC receives from the complaining party "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." *Id.* at 1148 n.2 (quoting 29 C.F.R. § 1601.12(b)). Under that regulation, a charge may be amended to cure "technical defects or omissions, including failure to verify the charge" and such amendments "will relate back to the date the charge was first received." *Id.* The Fourth Circuit held the regulation invalid, and Edelman's charge untimely, reasoning that because the statute requires a charge to be filed within 300 days and, separately, requires that a charge be verified, it must also require that a verified charge be filed within 300 days. *Id.* at 1148.

This Court reversed. It immediately took issue with the Fourth Circuit's syllogism: "Section 706(b) merely requires verification of a charge, without saying when it must be verified; §706(e)(1) provides that a charge must be filed within

a given period, without indicating whether the charge must be verified when filed." *Edelman*, 122 S. Ct. at 1149. The Court then explained why the EEOC's relation-back regulation is an "unassailable interpretation of §706." *Id.* at 1152. First, the Court said, applying the limitations period to verification "would ignore the two quite different objectives of the timing and verification requirements." *Id.* at 1149. The former puts the employer on notice of a claim before it gets stale and promotes speedy resolution of claims; the latter, by contrast, only seeks to assure that a complainant is "serious enough and sure enough" of the claim to support it under penalty of perjury. *Id.* Thus, the EEOC simply requires a complaint to be completed and verified before it requires the employer to respond. *Id.* at 1150 & n.9.

The Court also noted that it would be "hard pressed" to take a different view in light of its recent ruling in *Becker v. Montgomery*, 532 U.S. 757 (2001). *Edelman*, 122 S. Ct. at 1152. In *Becker*, the question was whether a timely-filed but unsigned notice of appeal was jurisdictionally defective because an amended notice providing the signature was filed only after the time to appeal had expired. In reversing the Sixth Circuit, *Becker* held that although a notice of appeal, like other district court filings, must be signed, signature is not a jurisdictional requirement. Therefore, so long as the notice itself was timely filed, the amendment containing the signature related back to the original filing. *See Edelman*, 122 S. Ct. at 1151 (discussing *Becker*). The *Edelman* court noted that permitting relation back in the EEOC administrative context was at least as reasonable as permitting it in the court context in *Becker*. *Id.* ("courts have shown a high degree of consistency in accepting later verification as reaching back to

an earlier, unverified filing.") (citing cases).[4]

On June 17, 2002, this Court granted the petition, vacated the Federal Circuit's decision, and remanded the case for further consideration in light of *Edelman*. Pet. App. 36a.

F. The Federal Circuit's Decision on Remand

After supplemental briefing before the same panel that heard the original appeal, the Federal Circuit again affirmed dismissal of petitioner's fee application, this time in a 2-1 decision, with Chief Judge Mayer dissenting. In the main, the panel majority simply reaffirmed its prior decision, holding that both EAJA's filing deadline *and* the pleading requirements contained in 28 U.S.C. § 2412(d)(1)(B) are "jurisdictional" and therefore must all be met within the 30-day time period. In that respect, the court's two opinions are verbatim the same or nearly so. *Compare* Pet. App. 28a-34a (initial opinion), *with* Pet. App. 4a-11a (post-remand opinion). The majority also

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[4]One final point regarding *Edelman* is significant. This Court was urged to decide whether the EEOC's relation-back regulation was entitled to deference as a reasonable interpretation of purportedly ambiguous statutory provisions. However, it did not reach that issue, which allowed it to avoid the complicated question whether the EEOC regulation was the kind of administrative pronouncement entitled to deference. *Compare Edelman*, 122 S. Ct. at 1150 & nn.7-8 (majority opinion), *with id.* at 1153-55 (O'Connor, J., concurring in the judgment). Rather, the Court found no ambiguity: "We find the EEOC rule not only a reasonable one, *but the position we would adopt even if there were no formal rule and we were interpreting the statute from scratch*." *Id.* at 1150 (emphasis added). Thus, *Edelman*'s relation-back holding arises solely from the statute itself, and the EEOC's regulation has no bearing on *Edelman*'s applicability to petitioner Scarborough's case.

concluded that *Edelman* was inapposite. It noted that *Edelman* was premised on the notion that the timely filing of a Title VII charge and the requirement that a charge be verified serve different purposes — repose on the one hand and the weeding out of frivolous claims on the other. *See Edelman*, 122 S. Ct. at 1149. In the majority's view, however, EAJA's filing deadline and the requirement that the fee applicant allege a lack of substantial justification serve the same purpose: to establish jurisdictional prerequisites for a fee award or, in the panel's words, to provide "the basis for the award itself." Pet. App. 14a.

Chief Judge Mayer disagreed, explaining that *Edelman* "implies that failure to timely include a simple allegation that does not prejudice the opposing party may relate back to a timely filed application." Pet. App. 19a. In addition, he noted that the majority had "unnecessarily narrow[ed] the waiver that Congress intended because the statutory language of ... EAJA does not mandate strict compliance or foreclose supplementation" of the fee application. *Id.* The purpose of the no-substantial-justification allegation, he maintained, was not to set a jurisdictional bar, but only "to place the burden on the government to make a positive showing that its position and actions during the course of the proceedings were substantially justified...." Pet. App. 20a (quoting S. Rep. No. 96-974, at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4726, 4992).

Petitioner sought rehearing en banc, which was denied on April 17, 2003. Pet. App. 37a.

REASONS FOR GRANTING THE WRIT

A. THE FEDERAL CIRCUIT'S DECISION CREATES A DIVISION AMONG THE FEDERAL COURTS OF APPEALS ON AN IMPORTANT ISSUE OF FEDERAL LAW.

1. As the Federal Circuit recognized (Pet. App. 7a-10a), its decision directly conflicts with decisions of the Third and Eleventh Circuits (and, as shown below, with a decision of the Sixth Circuit as well). In *Singleton v. Apfel*, 231 F.3d 853 (11th Cir. 2000), the court considered whether an EAJA fee applicant was jurisdictionally barred from recovery because she sought, after expiration of the 30-day filing period, to supplement her fee application to supply a net-worth allegation and "to allege that the Commissioner's position in the district court was not substantially justified," *id.* at 857, *the exact question presented here*. The Eleventh Circuit acknowledged that waivers of sovereign immunity should not be extended "beyond the limits set by Congress," *id.* at 858, but noted that courts should be careful not to impose "an undue narrowing of the waiver intended by Congress." *Id.* The court distinguished section 2412(d)(1)(B)'s limitations period itself from the statute's pleading requirements, holding "that the government's interest in finality and reliance are satisfied once a timely EAJA application has been filed." *Id.* *Singleton* thus held that the statute's pleading requirements are not jurisdictional, and remanded the case for proceedings on the merits of the applicant's fee claim. *Id.* "[N]ot unmindful" of the government's interests, however, the Eleventh Circuit also noted that courts have the power to order rapid completion of EAJA applications or to deny them entirely where delayed pleading prejudices the government. *Id.*

Singleton relied on the Third Circuit's decision in *Dunn v. United States*, 775 F.2d 99 (3d Cir. 1985), which also squarely conflicts with the decision below. In *Dunn,* the district court had dismissed, as jurisdictionally defective, a fee application that did not initially include the specific amount requested, an itemized statement of attorney time expended, or the rate at which fees were to be computed, even though the fee applicant had supplied the missing information shortly after the 30-day period had expired. *Id.* at 101-02. The Third Circuit reversed. The court explained that section 2412(d)(1)(B) contains two separate requirements — a deadline for filing and a pleading standard — and that "[t]he two requirements serve different purposes." *Id.* at 103. Although filing the fee claim within a certain time period serves the government's interest in finality and reliance, *id.* at 103-04, "once the claim is filed, whether or not it is as complete as it should be, the interests of proof of timeliness and of finality and reliance have been satisfied." *Id.* at 104. For these reasons, *Dunn* concluded that section 2412(d)(1)(B)'s pleading requirements are not jurisdictional and that a court may, absent prejudice to the government, permit supplementation of the fee application after expiration of the 30-day filing period. *But see id.* at 105 (Adams, J.) (dissenting from holding in *Dunn* on same grounds relied on by Federal Circuit below).

Although not mentioned by the Federal Circuit, the Sixth Circuit has also adopted the Third Circuit's reasoning in *Dunn*. *See United States v. True*, 250 F.3d 410 (6th Cir. 2001). *True* involved a fee application under the Hyde Amendment, which authorizes an award of attorney's fees to certain defendants who prevail in criminal litigation with the United States and expressly adopts all of "the procedures and limitations (but not the burden of proof)" set forth in EAJA. *Id.* at 414 n.1 (quoting Pub. L. No. 105-119, § 617, 111 Stat. 2519

(1997)). The government argued that True's timely-filed fee application was jurisdictionally barred because it had not alleged True's net worth or provided an itemized fee statement under 28 U.S.C. § 2412(d)(1)(B). *Id.* at 418. The Sixth Circuit rejected that argument and held that the "pleading requirements" of section 2412(d)(1)(B), as opposed to its 30-day filing deadline, are not jurisdictional, and that therefore "timely but flawed applications [do] not deprive the lower court of jurisdiction" to entertain the application. *Id.* at 421. The government conceded below that *True* conflicts with the Federal Circuit's decision in this case. *See* Appellee's Response to Petition for Rehearing En Banc, at 5-6, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Mar. 25, 2003).[5]

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[5]Although it did not frame the issue in terms of timeliness under section 2412(d)(1)(B), the Ninth Circuit's decision in *Thomas v. Peterson*, 841 F.2d 332 (9th Cir. 1988), also cannot be squared with the decision below. In that case, the court agreed with the government that the fee applicant had not adequately pleaded EAJA's net-worth requirements for organizational parties because the applicant did not state how many employees it had. *Id.* at 337; *see* 28 U.S.C. §§ 2412(d)(1)(B), (d)(2)(B). The Ninth Circuit did not dismiss the application, but rather remanded the case to allow the missing information to be presented to the district court, 841 F.2d at 337, a ruling that presupposes that the net-worth allegation did not have to be made within the 30-day filing period. In addition, a number of district court decisions are at odds with the Federal Circuit's ruling below and permit a fee applicant to supplement an otherwise timely fee application to provide information called for by section 2412(d)(1)(B). *See Olenhouse v. Commodity Credit Corp.*, 922 F. Supp. 489, 491 (D. Kan. 1996); *FDIC v. Addison Airport of Texas, Inc.*, 733 F. Supp. 1121, 1125 (N.D. Tex. 1990); *City of Brunswick v. United States*, 661 F. Supp. 1431, 1439 (S.D. Ga. 1987), *rev'd on other grounds*, 849 F.2d 501 (11th Cir. 1988). Other (continued...)

2. Not only is the division among the appellate courts irreconcilable, but the question presented is important and calls for this Court's immediate resolution, particularly now that the Federal Circuit has re-established the circuit conflict after the remand from this Court. One of Congress's concerns in enacting EAJA was that "the cost of contesting a Government order ... [can] exceed[] the amount at stake ...[,]" H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4988, as may often be the case when disability benefits or small government contracts are at stake. If, as petitioner maintains, the Federal Circuit's decision is incorrect, Congress's goal would be undermined because petitioner would be required to forgo his EAJA attorney's fees, thus significantly eroding the value of disability benefits wrongfully denied him for many years.

Unless corrected, the decision below will have an adverse effect on veterans who have prevailed in benefits disputes with the VA. *See Urquhardt v. Principi*, 2003 WL 1463586 (Vet. App. Mar. 19, 2003) (dismissing fee application for lack of jurisdiction based on ruling below). Indeed, in the time between the CAVC's fee decision below and this Court's decision vacating the original panel opinion, a significant number of fee applications against respondent were held jurisdictionally barred on the basis of the CAVC's decision, demonstrating the significant impact that the Federal Circuit's

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[5](...continued)
district courts agree with the Federal Circuit's approach. *See Sierra Club, Ill. Chapter v. Brown*, 1999 WL 652047, at *2-*3 (N.D. Ill. Aug. 20, 1999); *FDIC v. Fleischer*, 1996 WL 707030, at *4 n.4 (D. Kan. Oct. 16, 1996); *United States v. Hopkins Dodge Sales, Inc.*, 707 F. Supp. 1078, 1080-81 (D. Minn. 1989).

ruling will have unless this Court intercedes.[6]

Moreover, the fact that the decision below arises from the Federal Circuit is quite important, because, in addition to the large number of EAJA applications before the CAVC, *see supra* note 1, the Federal Circuit has appellate authority over many proceedings involving the federal government that are subject to EAJA, such as government contract cases, 28 U.S.C. § 1295(a)(10); *see* 5 U.S.C. § 504(b)(1)(C); GSA Board of Contract Appeals Rule 135 (procedure for seeking EAJA fees) (available at http://www.gsbca.gsa.gov/Rules.pdf), and matters arising from the United States Court of Federal Claims. *See* 28 U.S.C. §§ 1295(a)(3), 2412(d)(2)(F). In addition, EAJA applies to proceedings involving the government in the Federal Circuit itself, including appeals from decisions of the Merit Systems

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[6]*See Smith v. Principi*, 2001 WL 1403609 (Vet. App. Oct. 31, 2001) (dismissing fee application for failure to allege prevailing-party status; denying applicant's request to amend application outside of 30-day period under CAVC's decision in *Scarborough*); *Banks v. Principi*, 2000 WL 33582650 (Vet. App. Oct. 11, 2001) (dismissed for omission of no-substantial-justification allegation under *Scarborough*); *Wooten v. Principi*, 2001 WL 1079065 (Vet. App. Sept. 5, 2001); *Anania v. Principi*, 2001 WL 881641 (Vet. App. July 27, 2001) (dismissed for omission of no-substantial-justification allegation under *Scarborough*); *Clipper v. Principi*, 2001 WL 668926 (Vet. App. May 10, 2001) (same); *Lee v. Gober*, 14 Vet. App. 204 (Vet. App. 2000) (same; also rejecting equitable tolling); *see Urquhardt v. Principi*, 2001 WL 1021060 (Vet. App. Aug. 24, 2001) (raising *sua sponte* whether application should be dismissed for failure to include "all of the items described in *Scarborough*"). The CAVC had taken the same position in earlier rulings that were not appealed to the Federal Circuit. *See Graves v. Browning*, 15 Vet. App. 160 (Vet. App. 1996); *Franklin v. Brown*, 7 Vet. App. 388 (Vet. App. 1995).

Protection Board, 28 U.S.C. § 1295(a)(9); *see Olsen v. Department of Commerce*, 735 F.2d 558 (Fed. Cir. 1984) (EAJA fees available in appeals from MSPB), agency Boards of Contract Appeals, and the CAVC.

B. THE DECISION BELOW IS AT ODDS WITH THIS COURT'S DECISIONS IN *IRWIN* AND *EDELMAN*, AND THE TEXT AND STRUCTURE OF EAJA, AND IT EVIDENCES A LONGSTANDING CIRCUIT SPLIT ON THE QUESTION WHETHER EAJA'S LIMITATIONS PERIOD IS "JURISDICTIONAL."

1. The Federal Circuit erred in conceiving of EAJA's time limit as jurisdictional because it ignored — indeed, did not even cite — the key precedent on point. As noted earlier, in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court held that 42 U.S.C. § 2000e-16(c) — which allows an employee aggrieved by final action of the Equal Employment Opportunity Commission 30 days to file a Title VII action in federal court — is not jurisdictional, but rather operates like a statute of limitations subject to equitable principles, such as tolling, waiver, and estoppel. The Court concluded, as a general matter, that once Congress has waived the government's sovereign immunity (as it has in EAJA), there is a rebuttable presumption that those equitable principles apply to the same extent as in a suit among private parties, and that, therefore, limitations periods in actions against the government are not jurisdictional unless Congress has explicitly so provided. *Id.* at 96.

Moreover, *Irwin* expressly held that a statutory limitations period is not jurisdictional simply because it uses

assertedly mandatory language such as "shall." Such an approach, the Court held, "would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress." *Id.* at 95; *see also Franconia Associates v. United States*, 536 U.S. 129, 145 (2002) (rejecting special accrual rule where government is defendant and noting "that limitations principles should generally apply to the Government 'in the same way that' they apply to private parties") (quoting *Irwin*, 498 U. S. at 95).

In addition to *Irwin*, the majority below ignored two important textual reasons why EAJA's 30-day period is not jurisdictional. First, the Federal Circuit's ruling disregards the first sentence of EAJA, which provides that a court shall award fees to a prevailing party "in any civil action ... brought by or against the United States *in any court having jurisdiction of that action*." 28 U.S.C. § 2412(d)(1)(A) (emphasis added). The highlighted language recognizes that a court entertaining an EAJA application *already* has jurisdiction. *Cf. Luna v. Dept. of HHS*, 948 F.2d 169, 173 (5th Cir. 1991) (indicating that court's jurisdiction was based not on EAJA, but on Social Security Act, which was basis for plaintiff's claim on merits). Here, petitioner properly invoked the CAVC's jurisdiction in 1998 when he filed his disability appeal, and it would be strange, indeed unprecedented, to require a litigant to establish jurisdiction in the same court twice. Thus, an EAJA application is not intended to establish jurisdiction in the court in which it is filed. That alone differentiates an EAJA application from the cases involving notices of appeal upon which the Federal Circuit relied (Pet. App. 16a-17a), because a notice of appeal serves to give a court jurisdiction over a case in the first instance.

Second, as noted above (at 5, 10), EAJA places the burden of demonstrating substantial justification on the government (not on the fee applicant to demonstrate a lack of substantial justification). *See* 28 U.S.C. § 2412(d)(1)(A) (fees "shall" be awarded to the prevailing party, "unless" the court finds the position of the government was substantially justified). Thus, the government must carry that burden to avoid payment of fees to a prevailing party. *See, e.g., True*, 250 F.3d at 419 n.7 (citing cases); *see also* H.R. Rep. No. 120, Pt. I, 99th Cong., 1st Sess. 11, 13 (1985), *reprinted in* 1985 U.S.C.C.A.N. 140, 141; H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 10-11, 16, 18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4989, 4995, 4997. In light of that fact, it is unlikely that Congress would, in 28 U.S.C. § 2412(d)(1)(B), have imposed the strict jurisdictional bar that the Federal Circuit erected here, a bar that has produced serious harm to otherwise eligible fee applicants without any countervailing benefit.

Despite *Irwin* and EAJA's text, a number of circuit courts, in addition to the Federal Circuit, have held that EAJA's 30-day period is jurisdictional. *See* Pet. App. 6a (citing cases). None of those cases even cites *Irwin*, and most of them rely on pre-*Irwin* precedents that simply assume that the government is entitled to special treatment when invoking a time bar — exactly the opposite approach from the rule adopted in *Irwin*. *See, e.g., Yang v. Shalala*, 22 F.3d 213, 215 n.4 (9th Cir. 1994) (relying on *Columbia Mfg. v. NLRB*, 715 F.2d 1409, 1410 (9th Cir. 1983)); *Buck v. Sec'y of HHS*, 923 F.2d 1200, 1202 (6th Cir. 1991) (relying on *Allen v. Sec'y of HHS*, 781 F.2d 92, 94 (6th Cir. 1986)). On the other hand, the Fifth Circuit has held that EAJA's 30-day period is not jurisdictional and thus is subject to equitable tolling. *See Luna*, 948 F.2d at 173; *see also Bacon v. Sec'y of HHS*, 786 F. Supp. 434, 438 (D.N.J. 1992) (EAJA's 30-day period not jurisdictional under *Irwin*); *Golbach v.*

Sullivan, 779 F. Supp. 9, 11-12 (N.D.N.Y. 1991) (same). This split in the circuits provides another reason to grant review.[7]

Irwin's discussion of equitable tolling principles illuminates the error committed by the Federal Circuit. This Court has "allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96 & n.3 (citing cases); *see also Young v. United States*, 122 S. Ct. 1036, 1040-41 (2001) (reiterating *Irwin*'s tolling categories). Here, *according to respondent*, petitioner "fil[ed] a defective pleading during the statutory period[.]" In other words, even assuming that omitting the no-substantial-justification allegation was a defect, it is undisputed that petitioner's otherwise complete application was filed "during the statutory period," and thus, under *Irwin*, petitioner would be entitled to have the 30-day period tolled. This tolling principle is effectively the rule adopted by the Eleventh Circuit in *Singleton* and the Third Circuit in *Dunn*: When an EAJA application is filed within the 30-day period, the application may be supplemented at a later date to meet the statute's pleading requirements, absent prejudice to the government. *See also True*, 250 F.3d at 418 n.5; *cf. Becker v. Montgomery*, 532 U.S. 757 (2001) (appellant's omission of required signature on

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[7]The government acknowledges this circuit split as well. *See* Appellee's Response to Petition for Rehearing En Banc, at 15 n.8, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Mar. 25, 2002). We reiterate that, except for the Federal Circuit, even those circuits that hold that EAJA's *filing* deadline is jurisdictional also hold that its *pleading* requirements are not. *E.g., Dunn*, 775 F.2d at 103-04; *see supra* at 16-18.

notice of appeal is not jurisdictional defect, and signature may therefore be supplied after 30-day filing period imposed by Fed. R. App. P. 4).[8]

2. In two major respects, the Federal Circuit's ruling is irreconcilable with *Edelman v. Lynchburg College*, as this Court's prior remand based on that case suggests. The first is based on the textual similarities between 28 U.S.C. § 2412(d)(1)(B) of EAJA and section 706 of Title VII at issue in *Edelman*. As for EAJA, the Federal Circuit erred when it said that the 30-day filing period applies to all four pleading requirements contained in section 2412(d)(1)(B). *See* Pet. App. 4a, 5a. That is *not* what the statute says. The first sentence of section 2412(d)(1)(B), which contains the 30-day filing deadline for an "application," says that the "application" shall contain statements concerning prevailing-party status, the applicant's eligibility (net worth), and the amount of fees sought. The next sentence — which does not include any reference to the 30-day period or to the "application" — says that the "party shall also allege that the position of the United States was not substantially justified." *See* 28 U.S.C. § 2412(d)(1)(B). Thus, just as in *Edelman*, where the

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[8]Petitioner also urges tolling or estoppel on the ground that the pleading defect, if any, was induced by the government's misconduct. As explained earlier (at 7-9), petitioner submitted his fee application to the CAVC and served it on respondent before the 30-day period had started to run. If the government had complied with CAVC Rule 39(c), it would have answered the fee application within 30 days of service, which would have brought the alleged defect to petitioner's attention well before the 30-day period had expired. Respondent's non-compliance with the applicable CAVC Rule strongly suggests that respondent deliberately ensnared petitioner in a procedural trap by waiting to respond until after the 30-day period expired.

requirement that an EEOC charge be filed within 180 days was held not to apply to the requirement that the charge be verified, so too here, EAJA's 30-day filing requirement, contained in the first sentence of 28 U.S.C. § 2412(d)(1)(B), should not be superimposed on the no-substantial-justification allegation requirement, which is contained in the second sentence and has no deadline at all. Under this reading of the statute, the question is not whether EAJA's 30-day period is "jurisdictional," but whether the Federal Circuit erred by misconstruing the plain language of section 2412(d)(1)(B). *See Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another") (internal quotation marks and citation omitted). The Federal Circuit's misunderstanding of the statutory text further illuminates the split in authority between its decision and that of the Eleventh Circuit in *Singleton*, which came to the opposite conclusion on whether a fee application is jurisdictionally barred if the allegation that the government's position lacked substantial justification is not made within the 30-day period.

Second, *Edelman* held that a Title VII complainant's verification of an EEOC charge filed after the statute of limitations has run "relates back" to the date on which the EEOC charge itself is filed. Under *Edelman*, petitioner's amendment supplying the no-substantial-justification allegation relates back to his original, timely-filed fee application. The relation-back standard discussed in *Edelman* is that amendments to pleadings or other requests for relief relate back if they arise out of the subject matter of the original filing and the amendment would not prejudice the adverse party. *See* 122 S. Ct. at 1150 (relation-back doctrine applied by EEOC so as not to prejudice employers); *see also id.* at 1150 & nn.10, 12

(citing cases applying doctrine); *accord* Fed. R. Civ. P. 15(c)(2) ("amendment of a pleading relates back to the date of the original pleading when ... the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading") (cited in *Edelman*, 122 S. Ct. at 1151 n.10). That is essentially the position of the Third, Sixth, and Eleventh circuits regarding EAJA's pleading requirements: If the application itself is timely, it may be amended later to satisfy the pleading requirements, absent prejudice to the government. *See True*, 250 F.3d 410; *Singleton*, 231 F.3d 853; *Dunn*, 775 F.2d 99.

Petitioner's amendment to his fee application easily meets *Edelman*'s relation-back standard because the amendment indisputably arose out of the same subject matter as the original filing — the claim for fees arising from the CAVC's disability determination. And the government has never claimed prejudice here. Petitioner amended his application immediately after being informed that it was missing the no-substantial-justification allegation. At that point, the fee application could have been litigated on its merits without any delay or prejudice to the government or the court system.

Applying the relation-back doctrine is particularly appropriate here because EAJA provides the government with a substantial-justification defense in every case. Thus, the omitted statement — the no-substantial-justification allegation — is implicit in every EAJA application. Moreover, as explained above, in contrast to EAJA's other pleading requirements, EAJA places the burden of proof regarding substantial justification on the government, not the fee applicant. *See* 28 U.S.C. § 2412(d)(1)(A); *accord True*, 250

F.3d at 419 n.7 (citing cases). Thus, it is highly unlikely that a short-lived omission of a no-substantial-justification allegation could ever prejudice the government.[9]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 7, 2003 Counsel for Petitioner

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[9]Petitioner's omission was not that he failed to plead a factual basis for the no-substantial-justification allegation, which EAJA does not require, but simply that he did not plead a particular formulaic legal conclusion. Courts have consistently allowed relation-back when the only defect is an alleged failure to plead a legal conclusion. *See Bernstein v. National Liberty Int'l Corp.*, 407 F. Supp. 709, 712-13 (E.D. Pa. 1976) ("the failure to attach a legal conclusion, such as sexual discrimination, to the factual occurrences complained of has been interpreted to be a 'technical defect' . . . and, as such, an amended charge remedying the defect relates back to the original filing date."); *accord Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199, 202 (3d Cir. 1975), *vacated on other grounds*, 424 U.S. 737 (1976); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462 (5th Cir. 1970).

United States Court of Appeals for the Federal Circuit

00-7172

RANDALL C. SCARBOROUGH,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
Secretary of Veterans Affairs,

Respondent-Appellee.

DECIDED: February 13, 2003

Before MAYER, Chief Judge, RADER, and LINN, Circuit Judges.

Opinion for the court filed by Circuit Judge LINN. Dissenting opinion filed by Chief Judge MAYER.

LINN, Circuit Judge.

Randall C. Scarborough ("Scarborough") appeals from a dismissal by the United States Court of Appeals for Veterans Claims ("Veterans' Court") for lack of subject matter jurisdiction over his application for attorney fees and expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (2000). On December 10, 2001, this court entered judgment affirming the dismissal by the Veterans' Court

because Scarborough's fee application failed to comply with the jurisdictional prerequisites of the EAJA statute. Scarborough v. Principi, 273 F.3d 1087 (Fed. Cir. 2001). Scarborough petitioned for review by the Supreme Court, and on June 17, 2002, the Court granted certiorari, vacated our decision, and remanded the case to this court for consideration in light of Edelman v. Lynchburg College, 535 U.S. 106, 122 S. Ct. 1145 (2002). Scarborough v. Principi, 122 S. Ct. 2584 (June 17, 2002).

Following remand from the Supreme Court, this court's mandate was vacated, the case was returned to the panel, and we requested additional briefing from the parties regarding the applicability of Edelman to the current case. Scarborough v. Principi, 47 Fed. Appx. 931 (Sept. 18, 2002). Based on the Supreme Court's instruction and the supplemental briefing from the parties, we have reconsidered this case and, once again, affirm the decision of the Veterans' Court, dismissing Scarborough's EAJA application for lack of subject matter jurisdiction.

BACKGROUND

After prevailing in the underlying litigation, but before the Veterans' Court entered its mandate, Scarborough submitted an application for attorney fees and expenses to the Veterans' Court under the EAJA, 28 U.S.C. § 2412(d). On October 4, 1999, following the issuance of the mandate, the clerk of the Veterans' Court filed Scarborough's EAJA application. The application contained a showing that: (1) Scarborough was the prevailing party pursuant to the July 1999 remand order; (2) his net worth did not exceed the $2,000,000.00 limit for filing under the EAJA; (3) his attorney had represented him in the matter since August 1998; and (4)

the attorney had incurred fees and expenses during his representation of the appellant, as detailed in an attachment to the application.

On December 3, 1999, the Government filed a motion to dismiss the EAJA application for lack of subject matter jurisdiction. The Government argued that Scarborough had failed to satisfy all of the jurisdictional requirements under the EAJA statute because the application was missing an allegation that the Government's position in the underlying litigation lacked substantial justification. On December 9, 1999, Scarborough responded by filing an amendment to his EAJA application, supplying the previously omitted allegation that the Government's position lacked substantial justification.

The Veterans' Court examined the EAJA statute and held that each of the required parts of an EAJA fee application was a jurisdictional requirement that must be met within the thirty-day filing period, including the requirement that the applicant allege that the Government's position is "not substantially justified." See 28 U.S.C. § 2412(d)(1)(B) (2000). The Veterans' Court then dismissed Scarborough's EAJA application for lack of subject matter jurisdiction based on Scarborough's failure to allege, within the thirty-day filing period, that the Government's position was not substantially justified. Id. This appeal followed. We have jurisdiction under 38 U.S.C. § 7292.

DISCUSSION

A. Standard of Review

In reviewing decisions of the Veterans' Court, this court "shall decide all relevant questions of law, including

interpreting . . . statutory provisions." 38 U.S.C. § 7292(d)(1) (2000); Forshey v. Principi, 284 F.3d 1335, 1351-52 (Fed. Cir. 2002) (en banc). This court reviews an interpretation of statutory provisions by the Veterans' Court without deference. Jones v. Brown, 41 F.3d 634, 637 (Fed. Cir. 1994).

B. Analysis

"The EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity." Ardestani v. INS, 502 U.S. 129, 137 (1991). Such a waiver "must be strictly construed in favor of the United States," id., and "not enlarged beyond what the language requires." United States v. Nordic Vill., 503 U.S. 30, 34 (1992) (citation omitted). Once the government provides the waiver, "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S. 584, 586 (1941). We must, however, take care not to "assume the authority to narrow the waiver that Congress intended." United States v. Kubrick, 444 U.S. 111, 118 (1979).

In this case, the terms of the waiver are contained in the EAJA statute. That statute specifies that an applicant for an award of fees "shall," within thirty days of final judgment in the action, submit an application:

(1) showing that the applicant is a "prevailing party;"
(2) showing that the applicant "is eligible to receive an award;"
(3) showing "the amount sought," together with an itemization in support thereof; and
(4) alleging that the position of the United States "was not substantially justified."

28 U.S.C. § 2412(d)(1)(B) (2000); Singleton v. Apfel, 231 F.3d 853, 857 (11th Cir. 2000). The specific provision of the EAJA at the heart of this case states that:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified.

28 U.S.C. § 2412(d)(1)(B) (2000).

"[T]he starting point in every case involving construction of a statute is the language itself." Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 472 (1977). We first examine the language to determine the plain meaning of the words used by Congress. Bazalo v. West, 150 F.3d 1380, 1382 (Fed. Cir. 1998). In the absence of a clearly expressed legislative intention to the contrary, the statutory language must ordinarily be regarded as conclusive. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). "If the statute is clear and unambiguous, that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress." Sullivan v. Stroop, 496 U.S. 478, 482 (1990) (citation omitted). However, "where the text itself does not clearly exclude alternate interpretations, we look

first to the legislative history for illumination of the intent of Congress." Deluxe Corp. v. United States, 885 F.2d 848, 850 (Fed. Cir. 1989) (citing Shriners Hosps. v. United States, 862 F.2d 1561, 1563 (Fed. Cir. 1988)).

Here, the EAJA specifies that a party seeking an award of fees shall submit an application within the thirty-day time limit. 28 U.S.C. § 2412(d)(1)(B). The application must include each of the four requirements set forth in the statute. Id. The same mandatory language ("shall") is used with respect to the thirty-day time limit and the other four requirements that make up the application. Id. This court and five other U.S. Courts of Appeals have characterized the thirty-day time limit for submitting a fee application under the EAJA as jurisdictional in nature. See Bazalo, 150 F.3d at 1383; J.M.T. Mach. Co. v. United States, 826 F.2d 1042, 1047 (Fed. Cir. 1987); see also Yang v. Shalala, 22 F.3d 213, 215 n.4 (9th Cir. 1994); Newsome v. Shalala, 8 F.3d 775, 777 (11th Cir. 1993); Damato v. Sullivan, 945 F.2d 982, 986 (7th Cir. 1991); Welter v. Sullivan, 941 F.2d 674, 675 (8th Cir. 1991); Peters v. Sec'y of HHS, 934 F.2d 693, 694 (6th Cir. 1991).

The issue in this appeal is whether the fourth requirement of the EAJA statute, that "the party shall also allege that the position of the United States was not substantially justified," must be satisfied within the thirty-day period or may be satisfied at some later time and relate back to the timely filing of an incomplete application. The general question of whether the individual requirements of the EAJA statute are jurisdictional and must be satisfied within the thirty-day period was addressed in a number of cases decided by other Courts of Appeals and by this court in Bazalo. The Third Circuit in Dunn v. United States, 775 F.2d 99 (3d Cir. 1985), found that a failure to itemize the amount sought under the

EAJA may be corrected after the thirty-day time limit if no prejudice to the Government arises. Id. at 103. In a class action suit against several federal agencies involving radiation contamination by a uranium processing site, Dunn and the other named plaintiffs submitted an EAJA application that made the proper allegations that plaintiffs were prevailing parties and were eligible to receive a fee award, and that the position of the United States was not substantially justified. Id. at 100-01. However, the application failed to state the amount sought or to include an itemized statement of the actual time expended and the rate at which the expenses were computed. Id. at 101. The court held that as long as the EAJA application was filed within the thirty-day time limit, the application may be supplemented or corrected after the thirty-day period, provided that the Government was not prejudiced by the defect. Id. at 104.

The majority opinion in Dunn in effect cleaved § 2412(d)(1)(B) into two distinct components, a filing deadline and a standard for pleading:

> Requiring the filing of a fee claim (or any other) with the court . . . serves the purpose of establishing a means certain for proving compliance with a time bar. Such certainty is required in most situations in the interest of finality and reliance. But once the claim is filed, whether or not it is as complete as it should be, the interests of proof of timeliness and of finality and reliance have been satisfied. What remains is the fleshing out of the details . . . .

Dunn, 775 F.2d at 103-04.

The Eleventh Circuit in Singleton adopted the reasoning

of Dunn and likewise found that an EAJA application may be supplemented after the thirty-day time limit to satisfy the requirements regarding net worth and the Government's position being "not substantially justified." Singleton, 231 F.3d at 858. The class action plaintiffs in Singleton challenged a policy of the Social Security Administration ("SSA") involving payment of retroactive disability benefits in "random" fashion, resulting in the loss of Medicaid benefits for plaintiffs in certain states. Id. at 854. After the SSA reversed its policy and the court remanded for a determination of retroactive benefits due, the plaintiffs filed an application under the EAJA which arguably failed to allege that the plaintiffs met the net worth requirement and that the United States' position in the district court was not substantially justified. Id. at 855, 857. The court found that a timely EAJA fee application may be supplemented to meet the requirements of § 2412(d)(1)(B), but that district courts may "order rapid completion of the application or outright deny a request to supplement if the government would be prejudiced." Id. at 858. The court in Singleton stated:

> While it appears clear from the legislative history that Congress intended the filing requirement to be jurisdictional, it is far from apparent that Congress intended that "strict compliance with the pleading requirements must be accomplished within the same time as filing."

Id. (quoting Dunn, 775 F.2d at 103).

Both Singleton and Dunn venture beyond the plain language of the EAJA statute to consider underlying interests in finality and reliance as well as the legislative history. See id.; Dunn, 775 F.2d at 103-04. However, the legislative history, as cited by these cases, is not very enlightening. See

Singleton, 231 F.3d at 858 ("While it appears clear from the legislative history that Congress intended the filing requirement to be jurisdictional, it is far from apparent that Congress intended that 'strict compliance with the pleading requirements must be accomplished within the same time as filing.'" (quoting Dunn, 775 F.2d at 103) (emphasis added)).

We read the plain language of the EAJA statute to require not only that an application be filed by the thirty-day deadline, but that it contain averments addressing each of the four other requirements enumerated in the statute. 28 U.S.C. § 2412(d)(1)(B) (2000). Use in the statute of the same mandatory language with respect to the thirty-day deadline and each of the four enumerated application requirements indicates that all of the requirements must be addressed, if not satisfied, within thirty days in order for a court to assert jurisdiction. While we interpret the statute to require that the application address each of the requirements of the EAJA within the thirty-day period, the statutory language does not mandate strict compliance or foreclose supplementation where the details of the stated jurisdictional averments remain to be fleshed out or corrected. When the application completely fails to address one of the four statutory requirements by the thirty-day deadline, however, more than a "fleshing out of the details" remains and the application will be jurisdictionally defective.

In Bazalo, we held that the applicant satisfied the jurisdictional eligibility requirement by asserting he was a prevailing "party" entitled to an award in his EAJA application. 150 F.3d at 1383. Because his initial application satisfied the jurisdictional eligibility requirement, as well as all of the other jurisdictional requirements, this court gave Bazalo some latitude to supplement his application to flesh out the missing details of his net worth. Id. at 1383-84. Citing Dunn, the

opinion in Bazalo stated that "[w]e agree with the Third Circuit that while the time limitation should be strictly met, the content of the EAJA application should be accorded some flexibility." Id. at 1383.

In contrast to Dunn and Singleton, this court, in Bazalo, recognized that the EAJA statute contains "jurisdictional prerequisites" (plural). Id. at 1384 (emphasis added). We initially distinguished a "requirement" of the EAJA from a "jurisdictional prerequisite," and quoted Dunn's explication of the finality and reliance justifications for making such a distinction. Id. at 1383. However, we stopped short of adopting the holding of Dunn, instead both recognizing and analyzing as "jurisdictional requirements" and "jurisdictional prerequisites" each of the provisions of the fee application specified by the plain language of the EAJA and at the same time according fee applicants some latitude to provide details where a required averment may be less than fully explicated. Id. at 1383-84.

After enumerating the contents of Bazalo's EAJA application, including each of the four requirements of § 2412(d)(1)(B), we began our analysis by acknowledging that Bazalo had timely "met the jurisdictional requirements of the EAJA statute" and concluded by reiterating "that Bazalo's application of attorney fees and expenses met the jurisdictional prerequisites of the EAJA statute." Id. at 1383-84 (emphasis added). The requirements of the EAJA statute were recognized to include a showing that the applicant was a prevailing party, a showing that the applicant was eligible for an award, an allegation that the position of the United States was not substantially justified, and an itemized statement of fees sought. Id. The eligibility requirement, the details of which were initially lacking, was both identified as a "jurisdictional

requirement" and found to have been met by Bazalo in his initial application. Id. What was left was simply a fleshing out of the details of his net worth.

Although this court has characterized the four requirements of an EAJA application to be jurisdictional, we have recognized that details relating to the requirements may be "fleshed out" after the thirty-day deadline in certain circumstances. In this case, Scarborough argues that the fourth requirement itself--the allegation of a lack of substantial justification--should be considered separately from the other requirements and need not be alleged at all before the deadline. In accordance with the Supreme Court's remand of the present case for further review in light of Edelman, we reconsider whether the failure to comply with the requirement to allege lack of substantial justification within the thirty-day deadline is fatal to an EAJA application, or whether the applicant is permitted to supplement his application to include the missing allegation after the deadline and to have it relate back to the timely filed, but incomplete, original application.

The Edelman case did not involve an EAJA application, but rather a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 ("Civil Rights Act"). After being denied academic tenure at Lynchburg College, Mr. Edelman timely filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging gender-based discrimination, exacerbated by discrimination on the basis of national origin and religion. Section 706(b) of the Civil Rights Act requires charges to "be in writing under oath or affirmation . . . containing such information and . . . in such form as the Commission requires." Id. § 2000e-5(b). Section 706(e)(1) provides that "a charge shall be filed within one hundred and eighty [or in some cases, three hundred] days after the alleged

unlawful employment practice occurred." Id. § 2000e-5(e)(1). Although Mr. Edelman's charge initially did not include an oath or affirmation, he supplemented his original submission by filing a verified form approximately two weeks after the deadline. The district court dismissed the case, concluding that because Mr. Edelman's initial filing did not include an oath, it was not a "charge" under section 706 and the late-filed verified form could not relate back to and provide Mr. Edelman with a timely filing date. The Court of Appeals for the Fourth Circuit affirmed, interpreting sections 706(b) and 706(e)(1) of the Civil Rights Act in tandem to require that the charge must be verified within the specified time period. The Supreme Court disagreed.

In reversing the decision of the district and appellate courts, the Supreme Court reasoned that the purposes behind the verification requirement and the timeliness requirement were quite different. 122 S. Ct. at 1149. The Court held that while the timeliness requirement encourages prompt filing of claims and speedy resolution of discriminatory behavior, the verification requirement protects employers from frivolous claims. Id. The Court analogized the situation in the Edelman case to Becker v. Montgomery, 532 U.S. 757 (2001), in which the Supreme Court held that "while the timing and content requirements [for filing a notice of appeal under Rule 3 of the Federal Rules of Appellate Procedure] were 'jurisdictional in nature,' nothing prevented later cure of the [Rule 11 of the Federal Rules of Civil Procedure] signature defect." Edelman, 122 S. Ct. at 1151 (citing Becker, 532 U.S. at 765). The Court noted that both the verification requirement of Edelman and the signature requirement of Becker were aimed at stemming irresponsible litigation, and as such, concluded that it is not unreasonable to permit relation-back of a late-filed oath or signature to a timely-filed complaint or charge. Edelman, 122

S. Ct. at 1151.

The present case is distinguishable from Edelman and Becker. First, the statute at issue in Edelman is "a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." Id. at 1150 (quoting EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 124 (1988)). Edelman's permissive relation back of the verification requirement "ensures that the lay complainant, who may not know enough to verify on filing, will not risk forfeiting his rights inadvertently." Id.[1] The EAJA statute, however, is directed to attorneys seeking attorney fees. As such, this paternalistic protection is not required.

Second, the two requirements in Edelman--namely the timely filing of the charge and the verification--are contained in separate statutory provisions held not interdependent. 42 U.S.C. § 2000e-5(b); id. § 2000e-5(e)(1). Similarly, in Becker, the Supreme Court differentiated between the content and timing of a notice of appeal on the one hand and the signature requirement on the other, and noted that they are found in separate rules. Fed. R. App. P. 3(a)(1) (requiring that a notice of appeal be filed within thirty days); Fed. R. App. P. 3(c)(1) (listing the content requirements of a notice of appeal); Fed. R. Civ. P. 11(a) (requiring that every filing bear the signature of an attorney of record or the party, if unrepresented). Because

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[1]The dissent implies that requiring statutory compliance of the attorneys seeking attorney fees under EAJA would deter the vindication of one's rights. However, the goal of EAJA, to encourage claims against improper government action, is not and should not be dependent upon relaxed standards of statutory compliance coming not at the beginning of the process, but after the fact.

the verification and signature requirements are not present in the same statutory provisions and their purposes are different, the Court divorced these requirements from the timeliness requirement in each case. See, e.g., Becker, 532 U.S. at 766 ("[A] signature requirement is not among Rule 3(c)(1)'s specifications, for Civil Rule 11(a) alone calls for and controls that requirement and renders it nonjurisdictional.") In the present case, the situation is antithetical. The allegation of lack of substantial justification is part of the single statutory provision detailing both the contents required for an EAJA application and the requirement that the application be filed within thirty days. Moreover, the allegation of a lack of substantial justification is not a pro forma requirement, but rather requires an applicant to analyze the case record. 28 U.S.C. § 2412(d)(1)(B) ("Whether or not the position of the United States was substantially justified shall be determined on the basis of the record . . . .").

Third, the purpose of the fourth requirement of an EAJA application is not different than the other three requirements, unlike the verification of Edelman or the signature of Becker. The allegation that the government was not substantially justified is not simply a tool to weed out frivolous claims, but rather is one portion of the basis of the award itself. See, e.g., Comm'r, Immigration & Naturalization Serv. v. Jean, 496 U.S. 154, 165 (1990) ("The 'substantial justification' requirement of the EAJA establishes a clear threshold for determining a prevailing party's eligibility for fees, one that properly focuses on the governmental misconduct giving rise to the litigation."). Jean thus informs the jurisdictional nature of the allegation of a lack of substantial justification in describing that it "operates as a one-time threshold for fee eligibility." Id. at 160. After satisfying the four requirements of the EAJA application, only then does the court have jurisdiction to determine what fee

award is reasonable. Id. at 160-61.

The legislative history tags the lack of substantial justification allegation as a burden-shifting statute. S. Rep. No. 96-974, at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 4726, 4989 (stating that the allegation is intended "to place the burden on the government to make a positive showing that its position and actions during the course of the proceedings were substantially justified"). This, however, is belied by the plain language of the EAJA statute itself:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (emphasis added). Whether or not the allegation is made, the burden is always on the United States to assert the defense that it was substantially justified if it seeks to avoid an award of fees to the prevailing party. The brief commentary on burden-shifting in the legislative history is not helpful given the plain language of the statute itself.

For the reasons set forth above, we conclude that the allegation of a lack of substantial justification is a jurisdictional requirement of the EAJA statute that must be met within the specified thirty-day time period. To allow otherwise is contrary to the strict construction of the language of the statute required in cases of waiver of sovereign immunity. The averment is a

substantive requirement that is not so easily divorced from the remaining requirements and accompanying thirty-day deadline, both set forth in the same statutory provision. Moreover the purpose of the allegation is the same as for the other three requirements--to provide a threshold for fee determination. For these reasons, the allegation of a lack of substantial justification is more akin to insufficient content than the lacking signature in Becker. Edelman, 122 S. Ct. at 1151 ("We held that while the timing and content requirements for the notice of appeal were 'jurisdictional in nature,' nothing prevented later cure of the signature defect." (citing Becker, 532 U.S. at 765) (emphasis added)).

Because the allegation of no substantial justification is a jurisdictional requirement, the remaining question is whether the failure to so allege is fatal to an EAJA application. In this respect, this case is analogous to Smith v. Barry, 502 U.S. 244 (1992), and Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). In Torres, a notice of appeal in an employment discrimination suit omitted the petitioner's name due to a clerical error. The case was remanded by the Ninth Circuit back to the district court, where Oakland moved for partial summary judgment on the ground that the prior judgment was final as to the petitioner by virtue of his failure to appeal. The district court granted the motion and the appeals court affirmed. The Supreme Court granted certiorari to determine whether failure to file a notice of appeal in accordance with Rule 3(c) was a jurisdictional bar to the appeal. Fed. R. App. P. 3(c). In affirming the lower courts, the Supreme Court noted that the "failure to name a party in a notice of appeal is more than an excusable 'informality.'" Torres, 487 U.S. at 314. Moreover, the Court stated that "[p]ermitting imperfect but substantial compliance with a technical requirement is not the same as waiving the requirement altogether as a jurisdictional

threshold." Id. at 315-16. The Court had previously held that the filing requirements of Rule 3 were jurisdictional, based on a plain reading of the rule and the purpose as a threshold to appeal. See, e.g., United States v. Robinson, 361 U.S. 220, 224 (1960) (cited by Torres, 487 U.S. at 315).

Similarly, Scarborough's failure to allege a lack of substantial justification is not "an excusable informality" nor is it "imperfect but substantial compliance." Scarborough's application was instead completely devoid of a jurisdictional requirement. The required allegation of lack of substantial justification calls for substantive content, similar to the content requirements contemplated in Rule 3(c). This notion is further supported by the Smith case.

In Smith, the named appellant appealed a district court's dismissal of his action against Barry under 42 U.S.C. § 1983. While a motion for judgment as a matter of law was pending, Smith filed a premature notice of appeal. After a ruling on the motion for judgment as a matter of law, Smith filed an informal appeal brief within the deadline for filing a notice of appeal. The Court of Appeals for the Fourth Circuit dismissed Smith's appeal for lack of jurisdiction, holding that the notice of appeal was premature and that the informal brief was not a functional equivalent of the notice of appeal as required by Rule 3. Fed. R. App. P. 3(c). The Supreme Court granted certiorari to determine whether an appellate brief may serve as a notice of appeal. In remanding the case to the Court of Appeals to determine whether the informal brief included sufficient information as required by Rule 3(c), the Supreme Court cited Torres and concluded that "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review," and further noted that "noncompliance is fatal to an appeal." Smith, 502 U.S. at 248.

The present case is not an instance of substantial compliance with a technical requirement, but rather, absolute noncompliance with a jurisdictional threshold. Noncompliance is fatal. Scarborough is not seeking to merely "flesh out the details" of an otherwise complete application. Rather, he is seeking to add an entirely missing averment that is a jurisdictional requirement. Because he sought to add this averment after the expiration of the thirty-day deadline, his attempt to remedy the jurisdictional defect was untimely.

CONCLUSION

For the foregoing reasons, the dismissal by the Veterans' Court of Scarborough's EAJA application for attorney fees and expenses for lack of subject matter jurisdiction is AFFIRMED.

United States Court of Appeals for the Federal Circuit

00-7172

RANDALL C. SCARBOROUGH,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
Secretary of Veterans Affairs,

Respondent-Appellee.

MAYER, Chief Judge, dissenting.

Because I believe that: (1) Edelman v. Lynchburg College, 535 U.S. 106 (2002), implies that failure to timely include a simple allegation that does not prejudice the opposing party, may relate back to a timely filed application; (2) the court unnecessarily narrows the waiver that Congress intended because the statutory language of the Equal Access to Justice Act ("EAJA") does not mandate strict compliance or foreclose supplementation; and (3) Bazalo v. West, 150 F.3d 1380 (Fed. Cir. 1998), controls the outcome of this case, I dissent.

The "no substantial justification" allegation in the EAJA application is akin to the verification requirement of Edelman and the signature requirement of Becker v. Montgomery, 532 U.S. 757 (2001). The Court noted in those cases, respectively, that both the verification and signature requirements are aimed at stemming irresponsible litigation. Similarly, the no substantial justification allegation of EAJA serves a public

policy function; it is a burden-shifting mechanism to offset deterrents to contesting government action. The legislative history pointedly reveals that this simple allegation was included "to place the burden on the government to make a positive showing that its position and actions during the course of the proceedings were substantially justified . . . ." S. Rep. No. 96-974, at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 4726, 4992. Congress recognized that this standard struck a balance between the executive branch's duty to observe that the laws are faithfully executed and the public interest in encouraging parties to vindicate their rights. Id. at 4989. The legislative history further explains that the standard was implemented because it is easier for the government, controller of the evidence, to establish the reasonableness of its action versus a private party. Id. Moreover, failure to include the simple allegation within the thirty-day time period does not prejudice the government's response to the application. And the applicant need not marshal the facts to determine if the government's position was substantially justified. Comm'r, Immigration & Naturalization Serv. v. Jean, 496 U.S. 154, 160 (1990) ("Moreover, the 1985 amendment to § 2412(d)(1)(B) directs a court to determine whether the Government's past position was substantially justified 'on the basis of the record . . . .'" (Pub. L. No. 99-80, 99 Stat. 184-185, § 2(b) (codified as amended at 28 U.S.C. § 2412(d)(1)(B)))).

The objective of EAJA is to eliminate the financial disincentive for those who would defend against unjustified governmental action and thereby deter it. Jean, 496 U.S. at 163. In light of this and Bazalo, Becker, and Edelman, it is apparent that Congress did not intend the EAJA application process to be an additional deterrent to the vindication of rights because of a missing averment.

EAJA is a waiver of sovereign immunity and therefore must be strictly construed. But we must take care not to "assume the authority to narrow the waiver that Congress intended." United States v. Kubrick, 444 U.S. 111, 118 (1979). By holding that failure to include the "no substantial justification" allegation within the thirty-day filing requirement is an incurable jurisdictional requirement, the court indulges an "unduly restrictive" reading of the congressional waiver of sovereign immunity, Bowen v. City of New York, 476 U.S. 467, 479 (1986), rather than "a realistic assessment of legislative intent," Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990). In my view this is substantially the same case as Bazalo, which I would follow.

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 98-1590

Randall C. Scarborough,
Appellant,

v.

Togo D. West, Jr.,
Secretary of Veterans Affairs,
Appellee.

Before KRAMER, HOLDAWAY, and GREENE, Judges.

ORDER

Before the Court is the appellant's application, through counsel, for attorney fees and expenses in the amount of $19,333.75, pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The Secretary has filed a motion to dismiss for lack of jurisdiction, and the appellant has filed a response to the Secretary's motion. For the reason that follows, the Court will dismiss the appellant's application.

In the underlying litigation, the appellant appealed a July 1998 decision of the Board of Veterans' Appeals (Board), which determined, inter alia, that a March 1976 regional office (RO) decision, which had denied entitlement to service connection for chronic renal failure on the basis that the condition preexisted service, contained no clear and unmistakable error (CUE). In a July 9, 1999, order, this Court vacated the decision and remanded the matter on the basis that

both the 1976 RO decision and the Board decision failed to address the effect of the law existing at the time of the RO decision regarding the presumption of sound condition.

The appellant, through his counsel, submitted a premature EAJA application (App.) on August 19, 1999, which was filed on October 4, 1999, after entry of mandate in this case. In his application, the appellant stated that: (1) he was the prevailing party pursuant to the July 1999 remand order, (2) his net worth did not exceed the $2,000,000.00 limit for filing under the EAJA; (3) his attorney had represented him in the matter since August 1998; and (4) the attorney had incurred fees and expenses during his representation of the appellant, which were enumerated in an attachment to the application. App. at 1-2, Attachment. On December 3, 1999, the Secretary filed a motion to dismiss for lack of jurisdiction on the basis that the appellant failed to allege that VA's position lacked substantial justification. In response, on December 9, 1999, 112 days after submission of his application and 66 days after the filing of the application, the appellant filed an amendment to his EAJA application, in which he alleged that VA's position lacked substantial justification.

The Court has jurisdiction to award reasonable attorney fees and expenses pursuant to 28 U.S.C. § 2412(d)(2)(F), as amended by section 506 of the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 506, 106 Stat. 4506, 4513 (1992). In order to be eligible for an EAJA award, the EAJA application must be filed within the 30-day EAJA application period set forth in 28 U.S.C. § 2412(d)(1)(B). In addition, in order to satisfy jurisdictional requirements, the application must contain a showing that the applicant is a prevailing party, an assertion that the applicant is a party eligible for an award under the EAJA, and an allegation that the position of the

Secretary was not substantially justified. See 28 U.S.C. § 2412(d)(1)(A) and (B); *Chesser v. West*, 11 Vet. App. 497, 499 (1998); *Bazalo v. Brown*, 9 Vet.App. 304, 308 (1996) (en banc), *rev'd on other grounds sub nom. Bazalo v. West*, 150 F.3d 1380, 1384 (Fed. Cir. 1998). Although not a jurisdictional requirement, to be a party eligible for an EAJA award, an individual must show that his or her net worth did not exceed $2,000,000.00 at the time the civil action was filed. See 28 U.S.C. § 2412(d)(2)(B); *Bazalo*, 150 F.3d at 1383-84.

Contrary to the contention of the appellant, the United States Court of Appeals for the Federal Circuit (Federal Circuit) has not held that " the requirement to file [an EAJA application] within 30 days [is] clearly jurisdictional, but the other requirements of the statute [are] not." Appellant's Response (Resp.) at 1. As indicated above, this Court specifically held in *Bazalo v. Brown* that, inter alia, the requirement that an applicant must allege, within the requisite 30-day time period, that VA's actions lacked substantial justification is jurisdictional, and that an applicant may not amend a jurisdictionally defective application outside of that 30-day filing period. See 28 U.S.C. § 2412(d)(1)(B); *Bazalo*, 9 Vet.App. at 308-09. On appeal, the Federal Circuit left intact the holding of the Court on the substantial justification question, addressing solely the question whether a timely filed EAJA application may be supplemented after the expiration of the 30-day period for filing set forth in section 2412(d)(1)(B) to show eligibility by establishing that the applicant met the net worth requirement of section 2412(d)(2)(B). *See Bazalo v. West*, 150 F.3d at 1384 (holding, where application alleged position of VA lacked substantial justification and stated that applicant was "a prevailing party and entitled to receive an award," that application could be supplemented outside 30-day filing period to show that net worth requirement met if

Government not prejudiced thereby). Indeed, the Federal Circuit implicitly upheld this Court's ruling that an allegation of substantial justification within the requisite 30-day period is jurisdictional when it stated that Mr. Bazalo, who had specifically alleged a lack of substantial justification in his original, timely, fee application, "met the jurisdictional requirements" of the EAJA statute. *Id.; see also Commissioner, INS v. Jean*, 496 U.S. 154, 160 (1990) (a "fee application must contain an allegation 'that the position of the United States was not substantially justified'"). Accordingly, the application filed by the appellant within the 30-day filing period, which contained no mention whatsoever regarding substantial justification, is jurisdictionally deficient. The amendment alleging a lack of substantial justification, filed well outside of the requisite 30-day period, cannot correct such a jurisdictional deficit, *see Bazalo v. Brown*, 9 Vet.App. at 308-09, and the Court therefore lacks jurisdiction over the appellant's EAJA application.

On consideration of the above, it is

ORDERED that the appellant's application for an award of attorney fees and expenses under the EAJA is DISMISSED for lack of jurisdiction.

DATED: June 14, 2000 PER CURIAM.

United States Court of Appeals
for the Federal Circuit

00-7172

RANDALL C. SCARBOROUGH,
Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
Secretary of Veterans Affairs,
Respondent-Appellee.

DECIDED: December 10, 2001

Before MAYER, Chief Judge, RADER, and LINN, Circuit Judges.

LINN, Circuit Judge.

Randall C. Scarborough appeals from a dismissal by the United States Court of Appeals for Veterans Claims ("Court of Veterans Claims") for lack of subject matter jurisdiction over his application for attorney fees and expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (1994). We hold that an application for attorney fees and expenses that does not include, prior to expiration of the thirty-day deadline, an allegation that the position of the United States was "not substantially justified" fails to meet the jurisdictional prerequisites of the EAJA statute. Because Scarborough's

initial application failed to comply with the statute, and the Court of Veterans Claims correctly determined that it was without jurisdiction to consider his application, this court affirms.

BACKGROUND

Upon prevailing in the underlying litigation, Scarborough submitted prematurely (before the entry of the mandate in his case) an application for attorney fees and expenses under the EAJA, 28 U.S.C. § 2412(d). On October 4, 1999, following the issuance of the mandate, the clerk filed Scarborough's EAJA application which stated that: (1) he was the prevailing party pursuant to the July 1999 remand order; (2) his net worth did not exceed the $2,000,000.00 limit for filing under the EAJA; (3) his attorney had represented him in the matter since August 1998; and (4) the attorney had incurred fees and expenses during his representation of the appellant, which were enumerated in an attachment to the application. On December 3, 1999, the Government filed a motion to dismiss the EAJA application for lack of subject matter jurisdiction. The Government argued that Scarborough had failed to satisfy the jurisdictional requirements under the EAJA statute because he did not allege in his EAJA application that the Governments position in the underlying litigation lacked substantial justification. Scarborough filed an amendment to his EAJA application on December 9, 1999. In that amendment he alleged that the Government's position lacked substantial justification.

The Court of Veterans Claims examined the EAJA statute and held that it contains several jurisdictional requirements that must be met within the thirty-day filing period, including the requirement that the applicant allege that

the Government's position is "not substantially justified." See 28 U.S.C. § 2412(d)(1)(B) (1994).

The Court of Veterans Claims then dismissed Scarborough's EAJA application for lack of subject matter jurisdiction because it found that Scarborough did not allege, within the thirty-day filing period, that the Governments position was not substantially justified. Id. Scarborough timely appealed to this court, and we have jurisdiction over the appeal pursuant to 38 U.S.C. § 7292(c).

DISCUSSION

A. Standard of Review

In reviewing decisions of the Court of Veterans Claims, this court "shall decide all relevant questions of law, including interpreting . . . statutory provisions." 38 U.S.C. § 7292(d)(1) (Supp. V 1999). This court reviews an interpretation of statutory provisions by the Court of Veterans Claims without deference. Jones v. Brown, 41 F.3d 634, 637 (Fed. Cir. 1994).

B. Analysis

"The EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity." Ardestani v. INS, 502 U.S. 129, 137 (1991). Such a waiver "must be strictly construed in favor of the United States," id., and "not enlarged beyond what the language requires." United States v. Nordic Vill., 503 U.S. 30, 34 (1992). Once the government provides the waiver, "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S. 584, 586 (1941).

In this case, the terms of the waiver are contained in the EAJA statute. That statute specifies that an applicant for an award of fees "shall," within thirty days of final judgment in the action, submit an application:

(1) showing that the applicant is a "prevailing party;"
(2) showing that the applicant "is eligible to receive an award;"
(3) showing "the amount sought," together with an itemization in support thereof; and
(4) alleging that the position of the United States "was not substantially justified."

28 U.S.C. § 2412(d)(1)(B) (1994); Singleton v. Apfel, 231 F.3d 853, 857 (11th Cir. 2000). The specific provision of the EAJA at the heart of this case states that,

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses . . . . The party shall also allege that the position of the United States was not substantially justified.

28 U.S.C. § 2412(d)(1)(B) (1994) (emphasis added).

In construing a statute, "the starting point in every case involving construction of a statute is the language itself." Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 472 (1977). We first examine the language to determine the plain meaning of the words used by Congress. Bazalo v. West, 150 F.3d 1380, 1382 (Fed. Cir. 1998). In the absence of a clearly expressed legislative intention to the contrary, the statutory language must

ordinarily be regarded as conclusive. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). "If the statute is clear and unambiguous, that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress." Sullivan v. Stroop, 496 U.S. 478, 482 (1990).

The language of the EAJA statute is plain and unambiguous for the purposes of this appeal. A party seeking an award of fees "shall" submit an application including each of the four requirements enumerated, within the thirty-day time limit. 28 U.S.C. § 2412 (d)(1)(B) (1994). The same mandatory language ("shall") is used with respect to the thirty-day time limit as with the other four requirements, and all four are stated as parts of the necessary application.

This court and five other U.S. Courts of Appeals have characterized the thirty-day time limit for submitting a fee application under the EAJA as jurisdictional in nature. See Bazalo, 150 F.3d at 1383; J.M.T. Mach Co. v. United States, 826 F.2d 1042, 1047 (Fed. Cir. 1987). See also Yang v. Shalala, 22 F.3d 213, 215 n.4 (9th Cir. 1994); Newsome v. Shalala, 8 F.3d 775, 777 (11th Cir. 1993); Damato v. Sullivan, 945 F.2d 982, 986 (7th Cir. 1991); Welter v. Sullivan, 941 F.2d 674, 675 (8th Cir. 1991); Peters v. Sec'y of HHS, 934 F.2d 693, 694 (6th Cir. 1991).

The issue in this appeal is whether the other four requirements enumerated in the EAJA statute are likewise jurisdictional. This issue was addressed in a number of cases decided by other Courts of Appeals and by this court in Bazalo. The Third Circuit in Dunn found that a failure to itemize the amount sought under the EAJA may be corrected after the thirty-day time limit if no prejudice to the Government arises.

Dunn v. United States, 775 F.2d 99, 103 (3d Cir. 1985). In a class action suit against several federal agencies involving radiation contamination by a uranium processing site, Dunn and the other named plaintiffs submitted an EAJA application that made the proper allegations that plaintiffs were prevailing parties and were eligible to receive a fee award, and that the position of the United States was not substantially justified. Id. at 100-01. However, the application failed to state the amount sought or to include an itemized statement of the actual time expended and the rate at which the expenses were computed. Id. at 101. The court held that as long as the EAJA application was filed within the thirty-day time limit, the application may be supplemented or corrected after the thirty-day period, provided that the Government was not prejudiced by the defect. Id. at 104.

The majority opinion in Dunn in effect cleaved § 2412(d)(1)(B) into two distinct components: a filing deadline and a standard for pleading:

> Requiring the filing of a fee claim (or any other) with the court . . . serves the purpose of establishing a means certain for proving compliance with a time bar. Such certainty is required in most situations in the interest of finality and reliance. But once the claim is filed, whether or not it is as complete as it should be, the interests of proof of timeliness and of finality and reliance have been satisfied. What remains is the fleshing out of the details . . .

Dunn, 775 F.2d at 103-04.

The 11th Circuit in Singleton adopted the reasoning of Dunn and likewise found that an EAJA application may be

supplemented after the thirty-day time limit to satisfy the requirements regarding net worth and the Government's position being "not substantially justified." Singleton, 231 F.3d at 858. The class action plaintiffs in Singleton challenged a policy of the Social Security Administration ("SSA") involving payment of retroactive disability benefits in "random" fashion, resulting in the loss of Medicaid benefits for plaintiffs in certain states. Id. at 854. After the SSA reversed its policy and the court remanded for a determination of retroactive benefits due, the plaintiffs filed an application under the EAJA which arguably failed to allege that the plaintiffs met the net worth requirement and that the United States position in the district court was not substantially justified. Id. at 855, 857. The court found that a timely EAJA fee application may be supplemented to meet the requirements of § 2412(d)(1)(B), but that district courts may "order rapid completion of the application or outright deny a request to supplement if the government would be prejudiced." Id. at 858. The court in Singleton stated:

> While it appears clear from the legislative history that Congress intended the filing requirement to be jurisdictional, it is far from apparent that Congress intended that "strict compliance with the pleading requirement[s] must be accomplished within the same time as filing."

Singleton, 231 F.3d at 858 (quoting Dunn, 775 F.2d at 103).

Both Singleton and Dunn venture beyond the plain language of the EAJA statute to consider underlying interests in finality and reliance as well as the legislative history. See Singleton, 231 F.3d at 858; Dunn, 775 F.2d at 103-04. However persuasive these secondary tools might be, they cannot justify disregarding the plain language of the statute.

The plain language of the EAJA statute requires that an application not only be filed by the thirty-day deadline, but that the application contain averments addressing each of the four other requirements enumerated in the statute. 28 U.S.C. § 2412(d)(1)(B) (1994). Use in the statute of the same mandatory language with respect to the thirty-day deadline and each of the four enumerated application requirements indicates that all of the requirements must be addressed, if not satisfied, within thirty days in order for a court to assert jurisdiction. While the statute requires that the application address each of the requirements of the EAJA within the thirty-day period, the statutory language does not mandate strict compliance or foreclose supplementation where the details of the stated jurisdictional averments remain to be fleshed out or corrected. When the application completely fails to address one of the four statutory requirements by the thirty-day deadline, however, more than a "fleshing out of the details" remains and the application will be jurisdictionally defective.

Our precedent in Bazalo reflects the plain language of the EAJA discussed above. In Bazalo, we held that the applicant satisfied the jurisdictional eligibility requirement by asserting he was a prevailing "party" entitled to an award in his EAJA application. 150 F.3d at 1383. Because his initial application satisfied the jurisdictional eligibility requirement, as well as all of the other jurisdictional requirements, this court gave Bazalo some latitude to supplement his application to flesh out the missing details of his net worth. Id. at 1383-84. Citing Dunn, the opinion in Bazalo stated that "[w]e agree with the Third Circuit that while the time limitation should be strictly met, the content of the EAJA application should be accorded some flexibility." Id. at 1383.

In contrast to Dunn and Singleton, this court, in Bazalo,

recognized that the EAJA statute contains "jurisdictional prerequisites" (plural). Id. at 1384 (emphasis added). We initially distinguished a "requirement" of the EAJA from a "jurisdictional prerequisite," and quoted Dunn's explication of the finality and reliance justifications for making such a distinction. Id. at 1383. However, we stopped short of adopting the holding of Dunn, instead both recognizing and analyzing as "jurisdictional requirements" and "jurisdictional prerequisites" each of the provisions of the fee application specified by the plain language of the EAJA and at the same time according fee applicants some latitude to provide details where a required averment may be less than fully explicated. Id. at 1383-84.

After enumerating the contents of Bazalo's EAJA application, including each of the four requirements of § 2412(d)(1)(B), we began our analysis by acknowledging that Bazalo had timely "met the jurisdictional requirements of the EAJA statute" and concluded by reiterating "that Bazalo's application for attorney fees and expenses met the jurisdictional prerequisites of the EAJA statute." Id. at 1383-84 (emphasis added). The requirements of the EAJA statute were recognized to include a showing that the applicant was a prevailing party, a showing that the applicant was eligible for an award, an allegation that the position of the United States was not substantially justified, and an itemized statement of the fees sought. Id. at 1383-84. The eligibility requirement, the details of which were initially lacking, was both identified as a "jurisdictional requirement" and found to have been met by Bazalo in his initial application. Id. What was left was simply a fleshing out of the details of his net worth.

In the present case, Scarborough's initial EAJA application was not merely in need of the "fleshing out of the

details" as in Bazalo, but was entirely devoid of the required allegation that the Government's position was "not substantially justified." While Scarborough sought to add the missing averment to his EAJA application in an amendment, he failed to remedy the jurisdictional defect before the expiration of the thirty-day deadline. Because Scarborough's initial application failed to comply with the statute, and his amendment was not timely in correcting the omission, the Court of Veterans Claims correctly determined that it was without jurisdiction to consider his application.

CONCLUSION

Because the Court of Veterans Claims lacked jurisdiction over Scarborough's EAJA application, we affirm.

AFFIRMED

COSTS

No costs.

Supreme Court of the United States

Randall C. SCARBOROUGH,
Petitioner,

v.

Anthony J. PRINCIPI, Secretary of Veterans Affairs.

No. 01-1360.

June 17, 2002.

Case below, 273 F.3d 1087.

On petition for writ of certiorari to the Court of Appeals for the Federal Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Federal Circuit in light of *Edelman v. Lynchburg College*, 535 U.S. ----, 122 S.Ct. 1145, 152 L.Ed.2d 188 (2002).

United States Court of Appeals for the Federal Circuit

ORDER

A petition for rehearing en banc having been filed by the APPELLANT, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on April 24, 2003.

FOR THE COURT,

s/

Jan Horbaly,
Clerk

Dated: April 17, 2003 [Filed April 17, 2003]

cc: Brian Wolfman
Joseph Trautwein

SCARBOROUGH V DVA, 00-7172
(CVA - 98-1590)

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Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

United States Court of Appeals
for the Federal Circuit

00-7172

RANDALL C. SCARBOROUGH,
Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
Secretary of Veterans Affairs,
Respondent-Appellee.

ORDER

A petition for rehearing en banc having been filed by the APPELLANT, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on March 4, 2002.

FOR THE COURT,

s/

Jan Horbaly,
Clerk

Dated: February 25, 2002

cc: Brian Wolfman
Joseph Trautwein

SCARBOROUGH V DVA, 00-7172
(CVA - 98-1590)

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Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 98-1590

RANDALL C. SCARBOROUGH, APPELLANT,

V.

TODD D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before KRAMER, *Judge*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 29(i), this action may not be cited as precedent.

The appellant appeals a July 6, 1998, decision of the Board of Veterans' Appeals (Board or BVA) finding no clear and unmistakable error (CUE) in a March 25, 1976, rating decision that denied entitlement to service connection for chronic renal failure (claim 1), and denying an effective date earlier than April 21, 1993, for an award of service connection (and a 100% evaluation) for end stage renal disease (claim 2). Single-judge disposition is appropriate when, as here, the issue is of relative simplicity and the outcome is not reasonably debatable. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Because the appellant's arguments pertain only to claim 1, any appeal as to claim 2 is deemed abandoned. *See Ford v. Gober*, 10 Vet.App. 531, 535-36 (1997) (citing *Bucklinger v.*

Brown, 5 Vet.App. 435, 436 (1993)).

Under 38 C.F.R. § 3.105(a) (1997), a prior decision must be reversed or amended where evidence establishes CUE. For CUE to exist:

> (1) "[e]ither the correct facts, as they were known at the time, were not before the adjudicator (i.e., more than a simple disagreement as to how the facts were weighed or evaluated) or the statutory or regulatory provisions extant at the time were incorrectly applied," (2) the error must be "undebatable" and of the sort "which, had it not been made, would have manifestly changed the outcome at the time it was made," and (3) a determination that there was CUE must be based on the record and law that existed at the time of the prior adjudication in question.

Damrel v. Brown, 6 Vet.App. 242, 245 (1994) (quoting *Russell v. Principi*, 3 Vet.App. 310, 313-14 (1992) (en banc)). On appeal of a BVA determination that there was no CUE in a prior final RO decision, the Court's review is limited to determining whether the Board's conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 38 U.S.C. § 7261 (a)(3)(A), and whether the Board provided an adequate statement of reasons or bases for its denial of CUE. *See Eddy v. Brown*, 9 Vet.App. 52, 57 (1996); *Russell*, 3 Vet.App. at 315.

The Court has reviewed the record on appeal and the filings of the parties. Both the 1976 regional office (RO) decision, to the extent it determined that the appellant's chronic renal failure preexisted service, and the BVA decision, which determined that there was no CUE in such decision (as well as

the Secretary in his brief) failed to address (as raised by the appellant below (R. at 315)), the effect of the law as it existed at the time of the RO's 1976 adjudication, namely the presumption of sound condition. *See* Appellant's Reply Brief at 2. Accordingly, the Court concludes that the Board's decision is not supported by an adequate statement of reasons or bases and must be vacated. *See Eddy* and *Russell*, both *supra*. On remand, the BVA shall address such failure in the 1976 decision and its effect on the appellant's CUe claim. In doing so the BVA shall consider all the evidence of record at the time of the 1976 RO decision, not simply "an item of evidence" (R. at 12) supporting the government's position. Moreover, with respect to the latter, the BVA shall address in its determination, the significance of the lack of any signatures on the reports by the medical and physical evaluation boards. R. at 99-102, 106. Assuming that the BVA determines that any such failure is not outcome determinative, it shall then address, providing adequate reasons or bases, whether there was CUE in the 1976 RO decision insofar as it did not award service connection based upon aggravation. In this regard, the Board shall compare the appellant's disability at the time of entry into the service with his disability at discharge and provide reasons or bases as to whether, under the statutory and regulatory aggravation provisions extant at the time of the 1976 RO decision, there was an increase in disability during service, *see* Appellant's Reply Br. at 4 ("the Government... equated a temporary kidney condition, which was resolved prior to entry, to kidney failure after entry"), and if so, address under such law, the significance of the RO's failure to find that any such increase was due to the disease's natural progress.

On consideration of the foregoing, it is

ORDERED that the July 6, 1998, BVA decision is VACATED and the matter is REMANDED for further proceedings consistent with this order.

DATED: JUL -9 1999

BY THE COURT:

s/
KENNETH B. KRAMER
Judge